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Approved For Release 2001/08/27 : CIA-RDP57-00384R000500070007-5 ~~SECRET~~ 322C

OGC HAS REVIEWED.

29 October

MEMORANDUM FOR: Personnel Director

SUBJECT : Proposed Regulation ^{25X1A} [REDACTED] Employment of
Consultants and Experts

1. You have requested our comments or suggestions with respect to this proposed regulation. Comments on specific paragraphs follow. Generally we feel that the regulation, perhaps as a result of the definitions contained in paragraph 2, emphasizes the so-called intermittent consultant or expert to the almost total exclusion of the temporary type and thus presents a somewhat distorted picture of the subject. We also feel that the entire regulation might well be subjected to severe editing to remove redundancies.

2. Our specific comments are as follows:

a. In paragraphs 2(a) and 2(b) of the regulation consultants and experts are defined and an attempt is made to distinguish the two in particular on the basis of intermittent as against regular service. Under normal Governmental practice experts and consultants may both be divided into intermittent or temporary categories and with the exception of the fact that experts may exercise administrative and supervisory functions they are treated approximately the same as consultants. We would, therefore, suggest something in the following line as a more suitable definition:

A consultant is an employee serving the Government in an advisory capacity only, as distinguished from those who perform the statutory duties and responsibilities of the employing Agency. They may be employed on a temporary or intermittent basis. They may be on a fee basis or on an hourly basis depending on needs and circumstances. An expert is an employee performing duties requiring the services of a person exceptionally qualified by education and experience in a particular line to perform a service particularly required to accomplish the statutory provisions of the employing Agency, and who is not generally obtainable under Civil Service laws and regulations. As in the case of consultants experts may be employed on a

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temporary or intermittent basis or on a fee or hourly basis. Contrary to consultants experts may exercise administrative and supervisory functions.

b. In paragraph 6(b) of the regulation the word "intermittent" appears as a qualifying adjective to the type of service rendered by WOC experts and consultants. This is probably an improper adjective in this regulation in view of the word's technical meaning.

c. In paragraph 7(a)(1) of the regulation the statement is made that consultants will normally be employed for periods of less than one calendar month in duration. The statement is also made that a consultant who serves for more than one month becomes for certain purposes a temporary employee. This latter statement is open to question and will be discussed more completely in connection with paragraph 7(d)(1)(2). The first statement is also open to question and in our opinion should be removed.

d. In paragraph 7(a)(2) of the regulation appears the statement that one expert may not succeed another expert in the same unit performing the same duties when the aggregate of the two periods of service will exceed one continuous year. In our opinion this statement is not accurate. As a check we inquired of the General Accounting Office and were informed that the practice would not be questioned as long as there was no intention to replace a permanent employee by this mechanism.

e. In paragraph 7(b)(2) the statement is made that consultants and experts serving without compensation will be required to sign an appropriate waiver. We feel that some explanation should be added to state the nature of the waiver and perhaps an explanation of what is regarded as "an appropriate waiver."

f. The substance of paragraph 7(b)(3) is treated in another paragraph and might profitably be deleted.

g. In paragraph 7(d)(1) appears the statement that intermittent consultants and experts are not entitled to ~~and~~ Civil Service Retirement. In our opinion this statement is not completely accurate. In certain situations a person formerly entitled to retirement benefits may be eligible for reinstatement, although it appears that the fact of reinstatement is at the option of the employing Agency. This subject is discussed in section R-5-15 in the Federal Personnel Manual.


h. In section 7(d)(2) of the regulation appears

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the statement that consultants and experts who serve continuously for one calendar month or more become temporary employees who are entitled to accrue annual and sick leave. In our opinion this statement is not completely accurate. As we read the Annual and Sick Leave Act of 1951 a temporary employee, before he is entitled to accrue annual leave, must have been employed currently for a continuous period of 90 days without break in service. It is possible to envisage a temporary consultant who, because of irregular and non-recurring working hours, would not qualify under this condition. This subject is discussed in section LI-11 of the Federal Personnel Manual and in 31 Comp. Gen. 581.

i. Section 7(d)(2) contains the statement that Social Security deductions will be made for consultants and experts who serve continuously for one calendar month or more. Section 1426 of Title 26 of U.S.C. defines the term "employment" for purposes of the Social Security Act as excluding services performed in the employ of the United States if such service is performed by an individual as an employee who is excluded by Executive Order from the operation of the Civil Service Retirement Act of 1930 because he is paid on a contract or fee basis. We are of the opinion that the words "contract or fee basis" are sufficiently broad to include all types of employment contracts entered into by this Agency. This interpretation results in the conclusion that Social Security deductions should not be made for such individuals.

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